NO. 46599-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ZENAIDA MONTOYA,

Plaintiff/Appellant,

v.

BANK OF AMERICA HOME LOANS,
f/k/a COUNTRYWIDE HOME LOANS, INC.,
RECONTRUST CO., N.A.,
ERIN LEE PHILLIPS and JOHN DOE PHILLIPS, husband and wife,

Defendants/Respondents.

RESPONDENTS' ANSWERING BRIEF

Stephen M. Rummage, WSBA #11784
John A. Goldmark, WSBA #40980
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
Telephone: 206-622-3150
Facsimile: 206-757-7700
Attorneys for Respondents

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I. INTRODUCTION

This is not an appeal. It is an attempt to rewrite the history of the claims that appellant Zenaida Montoya filed, but failed to prosecute, below. Ms. Montoya seeks first to reinvent the Washington Consumer Protection Act ("CPA") claim that the trial court dismissed on summary judgment, and then to revive the remaining claims that the trial court dismissed because she failed to prosecute them for more than a year. This Court should affirm the trial court's judgment in both respects.

First, the trial court correctly dismissed Ms. Montoya's CPA claim on summary judgment because the claim she alleged, argued, and pursued below failed as a matter of law. Her CPA claim rested on a supposed violation of another statute, which Defendants showed did not apply to them. Further, the new CPA theories she invents on appeal are waived because she never raised them below, and she cannot claim the trial court erred on issues never presented to it. In any event, Ms. Montoya's new theories have no support in the record and likewise fail as a matter of law.

Second, the trial court correctly dismissed Ms. Montoya's remaining claims because she failed to prosecute her case for ***over a year***, and failed to note it for trial even after the court gave her an additional six weeks and warned her that failure to do so would result in dismissal. Civil Rule 41(b) therefore mandated dismissal for failure to prosecute.

II. STATEMENT OF THE CASE

A. The Countrywide Loan

In 2007, Ms. Montoya borrowed money from Countrywide Home Loans Inc. ("Countrywide") to refinance a loan and improve her Port Angeles home. CP 344 (Montoya Dep. at 94:21-95:2). Ms. Montoya had previously refinanced the purchase of her home twice, through Berkeley Mortgage and then later Ameriquest Mortgage Company ("Ameriquest"). CP 339-40 (Montoya Dep. at 67:18-68:5; 71:8-10). At the time of her Countrywide refinance, Ms. Montoya's monthly payment for her existing Ameriquest loan was $751, and she had been making timely payments for almost three years. CP 426, 642.

Ms. Montoya received Good Faith Estimates that identified the amount of her monthly mortgage payments. CP 343 (Montoya Dep. at 92:8-94:2). She received her loan application in the mail and admits she signed it, CP 349-51 (Montoya Dep. at 116:13-117:6; 121:18-122:21), though she claims did not review the application before signing it, CP 352 (Montoya Dep. at 126:2-14). Ms. Montoya claims that a Countrywide agent told her the loan would be "the same" as the Ameriquest loan, CP 352 (Montoya Dep. at 126:23-127:8), but she admits she never discussed the monthly payment amount or whether the payments would go toward

principal and interest. CP 356, 366 (Montoya Dep. at 146:20-147:1; 242:18-20, 242:15-17).

Ms. Montoya claims that, at her loan closing, she realized the loan would be different than she previously understood. CP 271, 291 (Montoya Dep. at 105:3-10; 107:8-15, 236:4-15). A Countrywide representative specifically advised Ms. Montoya that she could cancel her loan at any time, which Ms. Montoya understood. CP 346, 353 (Montoya Dep. at 104:16-19; 130:12-17). Nonetheless, Ms. Montoya chose to complete her loan closing because she did not want to waste the modest appraisal fee she had paid. CP 353 (Montoya Dep. at 130:25-131:4). She claims the closing agent did not afford her enough of an opportunity to review loan documents, but she admits she did not ask for more time to review the documents. CP 272 (Montoya Dep. at 109:8-22). She received copies of all documents she signed, including a TILA Disclosure statement—which specifically outlined the repayment terms of her mortgage to which she was agreeing. CP 274, 376-404 (Montoya Dep. at 120:1-4; Sullivan Dec. Exs. D-F).

B. Plaintiff's Default

As a part of refinancing her home, Countrywide provided Ms. Montoya about $50,000 in cash, which she used to make several improvements to her home and pay off credit card debt. CP 503

(summarizing improvements). Under the Countrywide loan, Ms. Montoya's monthly payment rose less than $100—from $751 to $843.75—and she received the $50,000 in cash. CP 642, 649.

Ms. Montoya claims that in March 2009, after two years of timely payments, she could no longer afford the loan payment and defaulted. CP 530. This default occurred ***eight years before*** Ms. Montoya's payments were scheduled to increase under the interest-only loan to which she agreed. *See* CP 649 (higher payments to begin July 1, 2017).

Ms. Montoya alleges that on July 7, 2009, she received a Notice of Default from ReconTrust Co., N.A. ("ReconTrust"). CP 530. ReconTrust, she alleged, was "doing business in Clallam County, Washington." CP 526. A Notice of Trustee's Sale, identifying a sale date of July 2, 2010, issued in March 2010, but no sale occurred. CP 520-21, 530. On October 16, 2012, Bank of America, N.A.—the successor by merger to Countrywide Home Loans Servicing, LP—released loan servicing to Bayview Loan Servicing. CP 330. Since that date, no defendant has possessed any interest in Ms. Montoya's loan. *Id.*

C. Plaintiff's Lawsuit

On May 24, 2010, Ms. Montoya filed a First Amended Complaint for Injunction and Damages in Clallam County Superior Court against Bank of America Home Loans (as successor to Countrywide Home

Loans), ReconTrust, Bank of New York Mellon Co. ("BNY Mellon"), and Erin Phillips (the Countrywide representative who assisted Ms. Montoya; she was later dismissed). CP 785. On May 25, 2015, Ms. Montoya filed a First Amended Motion for Order to Show Cause, and the trial court issued a First Amended Order to Show Cause based on that motion. CP 789-90, 791-92. Ms. Montoya, though, never served the First Amended Complaint ***or*** the First Amended Motion for Order to Show Cause on any defendant. CP 718-19. Even though she had not served the defendants, Ms. Montoya then sought an entry of default and permanent injunction. CP 760-61. The trial court issued a default judgment and permanent injunction, CP 791-92, both of which it vacated by stipulation on November 12, 2010—after Defendants advised the court of the defective service. CP 682.

Ms. Montoya then filed a Second Amended Complaint on February 16, 2011, in which she no longer asserted claims against BNY Mellon. CP 672-81. Defendants moved to dismiss that complaint, CP 652-67, but as the motion was pending, Ms. Montoya filed a ***Third*** Amended Complaint on March 5, 2012. CP 525-39. That complaint asserted claims for (1) fraud, (2) unconscionability, (3) violation of the Mortgage Broker Practices Act, RCW 19.146 *et seq.* ("MBPA); (4) violation of the Washington Consumer Protection Act, RCW 19.86 *et seq.*

("CPA"), premised solely on the MBPA claim; and (5) restraint of a Trustee's Sale, pursuant to RCW 61.24.130. *Id.*

On February 15, 2013, Defendants moved for summary judgment. CP 493-525. With respect to the MBPA and CPA claim, Defendants argued that (1) the MBPA did not apply to Countrywide, and the CPA claim was based entirely on the alleged MBPA violation; and (2) the CPA claim did not identify any harm proximately caused by Countrywide. CP 517-19. In opposition, Ms. Montoya argued only that a violation of the Consumer Loan Act would also suffice under the CPA. Nowhere in her opposition (or any trial court filing) did Ms. Montoya argue that any specific conduct or involvement by ReconTrust or Mortgage Electronic Registration Systems ("MERS") violated the CPA. She did not offer ***any*** facts related to ReconTrust or MERS and ***never*** argued that MERS had any relevance to her CPA claim. *See id.*

On May 21, 2013, the trial court granted summary judgment for all defendants on Ms. Montoya's claims for unconscionability, violations of the MBPA and CPA, and injunctive relief. CP 145-50. It also granted summary judgment for all fraud claims based on the conduct of the closing agent, and it granted summary judgment for ReconTrust on ***all*** claims because "there [did] not appear to be any allegations against defendant ReconTrust in the 3rd Amended Complaint." CP 149.

The ***only*** claims remaining after the trial court's order were fraud claims unrelated to the closing agent's actions. CP 150. The case then went into hibernation. Ms. Montoya did ***nothing*** to pursue her remaining claims for over a year—from May 21, 2013, until May 30, 2014, when Defendants moved to dismiss for want of prosecution under CR 41(b). CP 115-16, 117-20. On June 13, 2014, the Court continued the motion for six weeks, to allow Ms. Montoya to revive her case by noting it for trial. CP 110. In that time, Ms. Montoya filed a "First reply to defendants motion to dismiss for want of prosecution" and a "2nd response and declaration on Defendant's Motion to Dismiss for want of prosecution and plaintiff's complaint." CP 41, 50. But she never noted the case for trial, even though the trial judge told Ms. Montoya that she must do so to avoid dismissal. On August 4, 2014, the court dismissed the remaining fraud claims without prejudice, for failure to prosecute under CR 41(b). CP 38-39. Ms. Montoya timely filed a notice of appeal.

III. ARGUMENT

Ms. Montoya's appeal assigns two errors to the trial court, challenging: (1) summary judgment dismissal of her CPA claim, and (2) dismissal of her remaining fraud-based claims for want of prosecution. This Court will "not reverse the trial court on an issue that has not been appealed." *Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App.

753, 796, 189 P.3d 777 (2008) (citing RAP 2.4). Therefore, other than the CPA claim, Ms. Montoya has waived her right to challenge the dismissal of every other claim for which the trial court granted summary judgment: unconscionability, MBPA, injunctive relief, and fraud based on the actions of the closing agent. Those claims have been forever waived.

The errors Ms. Montoya does raise on this appeal have no merit. The trial court correctly dismissed her CPA claim on summary judgment and correctly dismissed her remaining claims under CR 41(b) for failure to prosecute. This Court should affirm.

A. The Court Should Affirm Dismissal of Plaintiff's Consumer Protection Act Claim.

The trial court correctly dismissed Ms. Montoya's CPA claim on summary judgment because the claim she alleged, argued, and pursued below—premised on alleged violations of the MBPA and CLA—failed as a matter of law. Further, the entirely new CPA claims she now tries to invent—for the very first time on appeal—are waived because she never raised them below, and in any event, these new claims have no support in the record and likewise fail.

1. Plaintiff Waived Her New CPA Theories by Failing to Raise Them Below.

Ms. Montoya's opening brief struggles to identify the acts she now claims to have violated the CPA, but one thing is clear—she ***never***

alleged, argued, or presented evidence to support her new CPA theories in the trial court. It is well settled that "[f]ailure to present an issue to the trial court precludes its consideration on appeal." *State v. O'Connell*, 83 Wn.2d 797, 822, 523 P.2d 872 (1974). Indeed, "[w]ithout a showing that the contention was presented to the court below, it cannot be considered here." *Boeing Co. v. State*, 89 Wn.2d 443, 450, 572 P.2d 8 (1978). Because "an issue, theory or argument not presented at trial will not be considered on appeal," this Court should summarily reject Ms. Montoya's new CPA theories as waived and improperly raised for the first time on appeal. *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978).

Under RAP 2.5(a), this Court refuses to review any issue that was not raised in the trial court. *See State v. Mashek*, 177 Wn. App. 749, 764, 312 P.3d 774 (2013). Although RAP 2.5(a) provides limited exceptions to this general rule,[1] Ms. Montoya's new arguments do not satisfy any of them. *See id.* at 764-65 (declining to "address [an] argument further" where plaintiff failed to raise any exception to RAP 2.5(a)).

Ms. Montoya's Third Amended Complaint identified only one predicate act for her CPA claim, alleging Defendants violated the MBPA.

[1] Under the Rule, "a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). In addition, a party may raise issues of appellate court jurisdiction, grounds for ***affirming*** a trial court decision, and issues raised by another co-party below. *Id.*

CP 537 (¶¶ 35-38). Accordingly, in moving for summary judgment dismissal of this claim, Defendants argued that Countrywide, a registered Consumer Loan Company, was not even subject to the MBPA (and thus could not have violated it), but rather it was subject to the Consumer Loan Act ("CLA"). Defendants also argued that regardless, Ms. Montoya suffered no actionable injury. In opposition, Ms. Montoya argued her *per se* CPA claim could rest on (1) a violation of the CLA, or (2) on the false loan application she alleged Countrywide submitted on her behalf. *See* CP 326. The trial court granted summary judgment on the claim, noting Ms. Montoya did not "allege any specific misrepresentation or deceptive statement by Countrywide." CP 149.

Nowhere in the record did Ms. Montoya raise any claims based on the supposed unfair or deceptive acts she identifies for the first time in her opening brief. She now appears to argue that she has a CPA claim based on: (1) naming MERS as a beneficiary in the Deed of Trust;[2] (2) ReconTrust's role as Trustee; and (3) alleged violation of the federal Home Affordable Modification Program ("HAMP"). Yet none of the ***four complaints*** she filed nor any of her motion papers or trial court files ever

[2] Ms. Montoya refers now to the Washington Supreme Court's decision in *Bain v. Metropolitan Mortgage Group, Inc.*, 176 Wn.2d 83, 292 P.3d 715 (2012), which issued in August 2012, seven months before she filed her opposition to Defendants' summary judgment motion. *See* CP 328. Thus, Ms. Montoya had every opportunity to make her claim that the assignment of MERS as beneficiary, acting as nominee for the lender, was in any way unfair or deceptive or caused her harm. She never did so.

raised these arguments or even referred to these alleged issues. As it pertains to these new claims, the Third Amended Complaint only alleged that: (1) MERS was named "as beneficiary to secure the promissory note to COUNTRYWIDE," CP 526; (2) ReconTrust, which "specializ[ed] in home foreclosure and default servicing and [did] business in Clallam County, Washington," had "sent a Notice of Default" and a "notice of foreclosure," CP 526, 530-31; and (3) Ms. Montoya could not obtain a modification of her loan, CP 530. She never alleged any of these acts were unfair or deceptive, nor did she allege Bank of America violated HAMP. In fact, she does not specify now in her appeal any HAMP provision with which Bank of America did not comply.

The CPA claim that Ms. Montoya alleged in her Third Amended Complaint, and argued below, does not give her *carte blanche* to raise entirely new CPA claims on appeal. *See Gardner v. First Heritage Bank*, 175 Wn. App. 650, 673-74, 303 P.3d 1065 (2013). In *Gardner*, plaintiff brought a CPA claim based on a foreclosure he alleged was unfair and deceptive. On appeal, he attempted to argue that the court should remand the CPA claim on the theory that an entirely different act—the bank entering an agreement the plaintiff called "the Ellis purchase and sale agreement"—was also unfair and deceptive. The Court held that it need "not reach [the plaintiff's] third CPA allegation because Gardner failed to

allege a CPA violation involving the Ellis purchase and sale agreement below." *Id.* at 674. Therefore, "[t]he assignment of error [was] waived." *Id.* (citing RAP 2.5(a)). The same is true here.

Ms. Montoya, like the *Gardner* plaintiff, attempts to argue her CPA claim now encompasses conduct never challenged as unfair or deceptive below. She cannot now assign error to the trial court's dismissal of her CPA claim based on new theories and new facts (found nowhere in the record) that she never alleged, argued, or presented in the trial court. *See Gardner*, 175 Wn. App. at 673-74; *Wash. Osteopathic Med. Assoc. v. King Cnty. Med. Serv. Corp.*, 78 Wn.2d 577, 582, 478 P.2d 228 (1970) (rejecting new CPA theory raised on appeal because "there is nothing in the record to indicate that this theory was presented to the trial court").

2. Even If Considered for the First Time on Appeal, Plaintiff's New CPA Claims Fail.

Even if Ms. Montoya ***had*** raised these new CPA claims below (and she did not), they have no support in the record and suffer fatal legal flaws. Therefore, if the Court is inclined to consider these new CPA theories (never raised below), it should nonetheless affirm the dismissal.

This Court reviews a decision granting summary judgment de novo and engages in the same inquiry as the trial court, to determine if there is a genuine issue of material fact for trial and if the moving party is entitled to

judgment as a matter of law. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). The court must view all facts most favorably to the nonmoving party. *Id.* But if a nonmoving plaintiff, like Ms. Montoya, fails to come forward with evidence sufficient to establish each element of her claims, the Court "shall" render judgment for defendant. CR 56(c); *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value." *Id.* "Issues of material fact cannot be raised by merely claiming contrary facts." *Id.*

To make out a prima facie CPA claim, Ms. Montoya must establish five elements: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) public interest impact, (4) injury to her business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Ms. Montoya's opening brief alludes to three new theories for her CPA claim: (1) MERS's designation as the beneficiary; (2) ReconTrust's appointment a trustee; and (3) Bank of America's compliance with federal HAMP guidelines. Op. Br. at 14-18. These new claims have no factual support in the record, could not have survived summary judgment (had she raised them below), and fail as a matter of law.

a. Plaintiff Fails to Show MERS' Status as a Beneficiary was Unfair or Deceptive or Caused Her Any Injury.

Ms. Montoya fails to provide evidence to survive summary judgment on any claim related to the Deed of Trust's designation of MERS as the beneficiary. She fails to show any unfair or deceptive act by any defendant, or that she suffered any injury caused by MERS's designation as beneficiary.

Ms. Montoya relies heavily on *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), and two main cases interpreting it. *See* Op. Br. at 15-17 (citing *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013) and *Bavand v. OneWest Bank*, 176 Wn. App. 475, 506-07, 309 P.3d 636 (2013)). These cases do not save Ms. Montoya's new CPA claims.

In *Bain*, the Court addressed whether a homeowner possesses a CPA claim ***against MERS*** "if MERS ***acts as an unlawful beneficiary*** under the terms of Washington's Deed of Trust Act." 175 Wn.2d at 115 (emphasis added). *Bain*, which only involved claims against MERS (which is ***not*** a defendant in this case), only considered whether a CPA claim results when MERS "acts as" the beneficiary—that is, where MERS takes action as the principal, rather than as an agent. The Court specifically noted that "the mere fact MERS is listed on the deed of trust

as a beneficiary is not itself an actionable injury." *Id.* at 119. Since *Bain*, courts have repeatedly dismissed CPA claims when a plaintiff relies solely on MERS's designation on the Deed of Trust, as Ms. Montoya does here. *See Mickelson v. Chase Home Fin., LLC*, 2012 WL 5377905, at *2 (W.D. Wash. Oct. 31, 2012) ("*Bain* does not hold that the presence of MERS in a mortgage creates a presumptive CPA claim."); *Estribor v. Mountain States Mortg.*, 2013 WL 6499535, at *3 (W.D. Wash. Dec. 11, 2013) ("The Deed of Trust clearly states MERS is a nominee for the lender and lender's successors and assigns. It is unclear how actions within that capacity are unfair or deceptive."). Indeed, after *Bain* was remanded, the trial court found plaintiff could not prove a CPA claim and dismissed on summary judgment. *Bain v. Metro. Mortg. Grp. Inc.*, Order Granting Summary Judgment, 2013 WL 6193887, at *5 (Wash. Super. Aug. 30, 2013).

Neither *Walker* nor *Bavand* serve as the panacea to save Ms. Montoya's claim. In *Walker*, plaintiff's complaint did not allege a CPA claim based on MERS's designation as beneficiary. 176 Wn. App. at 317-20.[3] And in *Bavand*, the plaintiff alleged that her property was sold because of the foreclosure resulting from MERS assigning its beneficial interest. 176 Wn. App. at 506-07. Based on these allegations, the Court

[3] When plaintiff later added a CPA claim against MERS, the trial court dismissed on summary judgment for lack of "any causation or any injury" because "there [was] no indication that MERS played any role" in plaintiff's foreclosure. *Walker v. Quality Serv. Corp. of Wash.*, Report of Proceedings, 2015 WL 1969843 (Wash. Super. Apr. 21, 2015).

held merely that the plaintiff could survive ***a motion to dismiss***, "subject to pleading and proof of . . . the . . . CPA claim elements." *Id.*

Ms. Montoya, though, has a greater burden on summary judgment, and must present specific ***facts*** to show deceptive acts by Defendants that caused her a cognizable injury. *See* CR 56(c). She cannot do so. She can cite ***no facts*** in the record regarding MERS's involvement other than its designation as the deed of trust beneficiary. *See* CP 526. The record contains ***no facts*** showing any action by MERS, nor any act of MERS that a defendant "ratified," as she claims in her brief. *See* Op. Br. at 17. Her claim is based solely on "the mere fact MERS is listed on the deed of trust as a beneficiary," *id.*—which the Washington Supreme Court holds is insufficient to support an actionable CPA claim. *Bain*, 175 Wn.2d at 119.

Moreover, Ms. Montoya has presented no evidence of ***any injury to business or property*** that she suffered because of any act of MERS. The CPA does not contemplate non-economic injuries, but rather requires an "injury to a consumer 'whose money has been diminished.'" *Ambach v. French*, 167 Wn.2d 167, 173, 216 P.3d 405 (2009) (citation omitted). Damages for "mental distress ... and inconvenience are not recoverable under the CPA," *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009), nor are any financial consequences of those injuries. *Ambach*, 167 Wn.2d at 178. Plaintiff must also show the unfair act itself

caused the cognizable injury, not investigating facts in an attempt to bring a CPA claim. *See Demopolis v. Galvin*, 57 Wn. App. 47, 54, 786 P.2d 804 (1990) (plaintiff's alleged injury resulting from bringing suit to protect against lender's foreclosure action was insufficient to satisfy injury element of a private CPA claim).

Ms. Montoya's brief refers to "damage to credit" and "late fees." Op. Br. at 4, 18. But she does not and cannot cite any evidence in the record that supports even the existence of these purported injuries or explains how they were caused by any defendant's conduct related to MERS.[4] Ms. Montoya cannot provide any evidence to satisfy any element, let alone each element, of a CPA claim based on MERS's designation as the beneficiary in the Deed of Trust.

b. Plaintiff Fails to Show any CPA Claim Based on ReconTrust's Role as a Trustee.

Ms. Montoya also has no CPA claim based on ReconTrust's role as the trustee (a role it no longer serves). Ms. Montoya can point to no record evidence showing that: (1) ReconTrust was not a proper trustee; or (2) she was in any way harmed by ReconTrust's status as trustee.

First, to avoid summary judgment on this theory, Ms. Montoya bore the burden of showing that ReconTrust was not a proper trustee in

[4] She also cites the "potential loss of her home to foreclosure," which is not a recoverable harm under the CPA. *See Panag*, 166 Wn.2d at 57 (personal injury, "mental distress, embarrassment, and inconvenience" not recoverable).

her case. But nothing in the record even suggests as much. Indeed, in her Third Amended Complaint, she alleged specifically that ReconTrust was "doing business in Clallam County, Washington." CP 526. She proffered no evidence to prove otherwise.

Courts have repeatedly found ReconTrust may serve as a proper trustee under Washington law. *See Singh v. Fed. Nat'l Mortg. Ass'n*, 2014 WL 504820, at *4 (W.D. Wash. Feb. 7, 2014); *Douglas v. ReconTrust Co.*, 2012 WL 5470360, at *4-5 (W.D. Wash. Nov. 9, 2012). In her brief, Ms. Montoya declares that "ReconTrust cannot be a trustee on a deed of trust in Washington because it did not maintain a physical presence in the state with a Washington telephone number." Op. Br. at 17-18. But she can cite ***no record facts*** to support this proposition.[5]

Second, Ms. Montoya also fails to show that ReconTrust's status as trustee caused her any cognizable injury. She claims in her brief (without any record support) that ReconTrust did not have "a phone number that the Appellant could use to contact ReconTrust to discuss a default or trustee's sale." Op. Br. at 18. Setting aside the lack of any facts

[5] Instead Ms. Montoya only refers to—but does not provide—a lawsuit brought by the Attorney General against ReconTrust, which alleged the ReconTrust had not properly established a physical presence in Washington under the Deeds of Trust Act. That lawsuit settled without any findings on the merits in August 2012—more than two years after ReconTrust took any action with respect to Ms. Montoya. *See* Consent Decree, *State v. ReconTrust Co.*, 2:11-cv-01460-JLR, Dkt. No. 16 (W.D. Wash. Aug. 14, 2012); *see also* CP 531 (alleging that ReconTrust issued a notice of foreclosure on July 2, 2010).

to support this claim, the record also contains no evidence that (a) she ***attempted*** to contact ReconTrust, (b) she was ***unable*** to contact ReconTrust, or (c) any such lack of contact caused her any ***injury***.

Moreover, because Ms. Montoya does not dispute that she defaulted, any expense resulting from her notice of default or foreclosure is "[an] . . . expense would have been incurred ***regardless*** of whether a violation existed," and thus, "causation [of damages] cannot be established." *Panag*, 166 Wn.2d at 64 (emphasis added).

Because she has provided no evidence to show a genuine issue of material fact regarding a CPA violation based on ReconTrust's role as trustee, the Court should affirm the trial court's dismissal of CPA claim.

c. Plaintiff Fails to Allege Any Basis for a HAMP Violation.

Finally, Ms. Montoya refers in passing to the Home Affordable Program (HAMP) and alleges—once again, without any supporting record facts—that Bank of America did not "comply with this law." Op. Br. at 14. Notably, she does not even allege what HAMP provision Bank of America supposedly violated. She provides no reason why HAMP should cause this Court to reverse the trial court's dismissal of her CPA claim.

Washington law does not require lenders to modify loans of defaulting debtors. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 572, 807

P.2d 356 (1991). However, even assuming a HAMP violation could serve as the basis for an actionable CPA claim, Ms. Montoya can cite no evidence to show Bank of America (or Countrywide before it) violated any HAMP provision. Although it is undisputed that Plaintiff was denied a loan modification, CP 241, Ms. Montoya has never shown she was eligible under HAMP for such a modification. In fact, she admitted that her loan modification was denied "because of [her] income." CP 286 (Montoya Dep. at 193:1-195:5).

Corvello v. Wells Fargo Bank, 728 F.3d 878 (9th Cir. 2013)—the sole case Ms. Montoya cites for this theory—does not provide her any assistance. In *Corvello*, plaintiffs alleged they (1) were eligible for a modification under HAMP, (2) received a Trial Period Plan (TPP) under HAMP, and (3) complied with the TPP. *Id.* at 881-82. The sole issue for the court was whether, under federal law, plaintiffs had sufficiently alleged that the bank had an obligation to modify their loans. The court—accepting the allegations as true under Rule 12(b)(6)—held that the bank "was contractually required to offer the plaintiffs a permanent mortgage modification ***after*** they had complied with the requirements of a trial period plan." *Id.* at 880.

Ms. Montoya, though, has not shown she was even ***eligible*** for a modification under HAMP, much less that she had either (a) received a

TPP or (b) satisfied its conditions. She simply throws HAMP at the wall, hoping it sticks. She did not meet her burden on summary judgment to raise or prove this claim below. The Court should affirm the dismissal of her CPA claim.

B. The Trial Court Properly Dismissed Plaintiff's Remaining Claims for Failure to Prosecute.

The trial court also correctly dismissed Ms. Montoya's remaining claims because she failed to prosecute her case for ***over a year***, and failed to note it for trial even after the trial judge gave her an additional six weeks and warned her that failure to do so would result in dismissal.

After ten days' notice, Civil Rule 41(b)(1) ***requires*** the court to dismiss an action for lack of prosecution "whenever the plaintiff . . . neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure . . . was caused by [the moving party]." When plaintiff fails to note the case for trial before a hearing on a Civil Rule 41(b)(1) motion, "dismissal of an action is ***mandatory***; there is no room for the exercise of a trial court's discretion." *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 167, 750 P.2d 1251 (1988) (listing cases) (emphasis added); *see e.g.*, *Simpson v. Glacier Land Co.*, 63 Wn.2d 748, 750-51, 388 P.2d 947 (1964) (granting defendant's

CR 41(b)(1) motion to dismiss when plaintiff failed to note breach of contract action for trial within one year).

The Third Amended Complaint was filed on March 12, 2012, and no issues of fact or law had been joined since. The court issued its order granting summary judgment in part on May 21, 2013. After that, Ms. Montoya did nothing to pursue her remaining claims for over ***one year***. She did not seek discovery, note the matter for trial, or otherwise do anything to prosecute her case. When Defendants moved to dismiss for want of prosecution, Ms. Montoya ***never*** noted the case for trial,[6] and still failed to do so even after the trial court continued the motion and gave her an additional six weeks to set the matter for trial.

One week before her extension expired, Ms. Montoya submitted two documents, styled "[f]irst reply to defendants' motion to dismiss," CP 41-49, and "2nd response and declaration on Defendant's Motion to Dismiss," CP 50. Both documents appeared to try to allege claims against a ***new*** defendant—BNY Mellon—but neither document sought leave to amend as required by CR 15. More importantly, neither paper joined any new issue of fact or law regarding the existing defendants who had moved to dismiss. Because Ms. Montoya failed to set the case for trial with the

[6] After Defendants sought dismissal, Ms. Montoya set a hearing date and sought to have the court appoint her new counsel (which the court declined to do), but she never noted a trial date as CR 41(b) requires.

additional six weeks afforded to her, the trial court dismissed her remaining claims for failure to prosecute pursuant to CR 41(b).

Four years after she filed her first complaint, Ms. Montoya was no closer to bringing her claims against to trial. Her case had become the kind of "unresolved and inactive litigation" causing the "cluttering of court records" that CR 41 seeks to prevent. *Franks v. Douglas*, 57 Wn.2d 583, 585, 358 P.2d 969 (1961). Even though CR 41 required Ms. Montoya to note her case for trial within 10 days of Defendants' motion to dismiss, the trial court gave her ***more than six weeks*** to do so—and she never did. CR 41 therefore mandated the dismissal of her remaining claims, and this Court should affirm.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the trial in dismissing Ms. Montoya's CPA claim on summary judgment and dismissing her remaining claims under CR 41(b).

RESPECTFULLY SUBMITTED this 1st day of June, 2015.

Davis Wright Tremaine LLP
Attorneys for Respondents

By _____

Stephen M. Rummage, WSBA #11784
John A. Goldmark, WSBA #40980
1201 Third Avenue, Suite 2200
Seattle, WA 98101
Telephone: 206-622-3150
Facsimile: 206-757-7700

DECLARATION OF SERVICE

I declare that a true and correct copy of Respondents' Answering Brief was served on the following as indicated below:

Jill J. Smith
Natural Resource Law Group PLLC
2217 NW Market St., Suite 27
Seattle, WA 98107
(206) 227-9800 Phone
(206) 466-5645 Fax

VIA ELECTRONIC SERVICE AND FIRST CLASS MAIL

I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Dated this 1st day of June, in Seattle, Washington.

John A. Goldmark